

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT
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5
6 August Term, 2005
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8 (Argued October 28, 2005 Decided August 30, 2006)
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10 Docket Nos. 05-0327-cv(L), 05-0517-cv(XAP)
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14 ZACHARY GUILLES, by his father and next friend, Timothy Guiles;
15 and by his mother and next friend Cynthia Lucas,
16

17 Plaintiff-Appellant-Cross-Appellee,
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19 v.
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21 SETH MARINEAU, KATHLEEN MORRIS-KORTZ, DOUGLAS SHOIK
22 and RODNEY GRAHAM,
23

24 Defendants-Appellees-Cross-Appellants.
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28 Before:

29 CARDAMONE, POOLER, and SOTOMAYOR,
30 Circuit Judges.
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34 Plaintiff Zachary Guiles, a minor, through his mother and
35 father, appeals the judgment entered on December 20, 2004 in the
36 United States District Court for the District of Vermont
37 (Sessions, C.J.). Guiles contends defendants, school officials
38 at his middle school, abridged his right under the First
39 Amendment to engage in political speech by forcing him to cover
40 images on his T-shirt. Guiles also sought to have the
41 disciplinary action taken against him expunged from his record.
42 The district court declined to enjoin defendants from enforcing
43 the school's dress code policy against Guiles with regard to the
44 T-shirt. It further held that the disciplinary action should be
45 expunged because defendants should not have censored the word
46 "cocaine" on the T-shirt. Both parties appeal.
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48 Affirmed in part, vacated in part, and remanded.
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STEPHEN L. SALTONSTALL, Bennington, Vermont (Barr Sternberg Moss
Lawrence Silver Saltonstall & Scanlon, P.C., Bennington,
Vermont, of counsel; ACLU Foundation of Vermont, Inc.,
cooperating attorney), for Plaintiff-Appellant-Cross-
Appellee.

ANTHONY B. LAMB, Burlington, Vermont (Mary L. Desautels, Lamb &
Desautels, Attorneys at Law, P.C., Burlington, Vermont, of
counsel), for Defendants-Appellees-Cross-Appellants.

1 CARDAMONE, Circuit Judge:

2 This case requires us to sail into the unsettled waters of
3 free speech rights in public schools, waters rife with rocky
4 shoals and uncertain currents. Plaintiff Zachary Guiles, a 13-
5 year-old student at Williamstown Middle High School (WMHS,
6 Williamstown High School, or school) in Williamstown, Vermont,
7 claims his right under the First Amendment to wear a T-shirt
8 depicting President George W. Bush in an uncharitable light has
9 been violated. The T-shirt, through an amalgam of images and
10 text, criticizes the President as a chicken-hawk president and
11 accuses him of being a former alcohol and cocaine abuser. To
12 make its point, the shirt displays images of drugs and alcohol.

13 Upon the complaint of another student and her mother, school
14 officials made Guiles put duct tape over the alcohol- and drug-
15 related pictures on the ground that those illustrations violate a
16 school policy prohibiting any display of such images. Plaintiff,
17 through his mother and father, brought the instant action to
18 enjoin the school's application of the policy to his shirt,
19 asserting that the policy violates his freedom to engage in
20 political speech. After a three-day bench trial, the United
21 States District Court for the District of Vermont (Sessions,
22 C.J.) held the school's censorship a permissible abridgement of
23 Guiles's First Amendment rights. From this holding the plaintiff
24 appeals. The district court also ordered that the disciplinary
25 action defendants took against plaintiff be expunged from his
26 school record. From this holding defendants appeal. Guiles ex

1 rel. Lucas v. Marineau, 349 F. Supp. 2d 871 (D. Vt. 2004). For
2 the reasons set forth below, we affirm in part, vacate in part,
3 and remand this case to the district court.

4 BACKGROUND

5 A. The Parties

6 In May 2004 plaintiff Guiles was a seventh-grade student at
7 Williamstown Middle High School. Defendant Seth Marineau was the
8 student support specialist at the school during the 2003-2004
9 academic year. His job included enforcing dress code policy.
10 Defendant Kathleen Morris-Kortz was the principal of the high
11 school, and defendant Douglas Shoik was the superintendent of the
12 Orange North Supervisory Union, which includes WMHS
13 (collectively, defendants). In his action Guiles has sued the
14 defendants in their official capacities.

15 B. The T-shirt

16 In March 2004 plaintiff began wearing the offending T-shirt
17 to school. He had purchased it at an anti-war rally he attended.
18 The front of the shirt, at the top, has large print that reads
19 "George W. Bush," below it is the text, "Chicken-Hawk-In-Chief."
20 Directly below these words is a large picture of the President's
21 face, wearing a helmet, superimposed on the body of a chicken.
22 Surrounding the President are images of oil rigs and dollar
23 symbols. To one side of the President, three lines of cocaine
24 and a razor blade appear. In the "chicken wing" of the President
25 nearest the cocaine, there is a straw. In the other "wing" the
26 President is holding a martini glass with an olive in it.

1 Directly below all these depictions is printed, "1st Chicken Hawk
2 Wing," and below that is text reading "World Domination Tour."

3 The back of the T-shirt has similar pictures and language,
4 including the lines of cocaine and the martini glass. The
5 representations on the back of the shirt are surrounded by
6 smaller print accusing the President of being a "Crook," "Cocaine
7 Addict," "AWOL, Draft Dodger," and "Lying Drunk Driver." The
8 sleeves of the shirt each depict a military patch, one with a man
9 drinking from a bottle, and the other with a chicken flanked by a
10 bottle and three lines of cocaine with a razor. Without question
11 Guiles's T-shirt uses harsh rhetoric and imagery to express
12 disagreement with the President's policies and to impugn his
13 character.

14 C. School Action Relating to the T-shirt

15 Guiles wore the T-shirt on average once a week for two
16 months. Although the shirt evoked discussion from students, it
17 did not cause any disruptions or fights inside or outside the
18 school. But, the T-shirt raised the ire of one fellow student
19 whose politics evidently were opposed to Guiles's. This student
20 complained to teachers who told her that the shirt was political
21 speech and therefore protected.

22 On May 12, 2004 Guiles was to go on a school field trip. He
23 wore the T-shirt that day. A parent who was to chaperone the
24 trip -- indeed the parent of the student who had previously
25 complained to teachers regarding the shirt -- noticed the shirt
26 and voiced her objection to defendant Marineau.

1 Marineau, after consulting with Shoik, determined that the
2 T-shirt, specifically the images of drugs and alcohol, violated
3 the following provision of the WMHS dress code:

4 Any aspect of a person's appearance, which
5 constitutes a real hazard to the health and
6 safety of self and others or is otherwise
7 distracting, is unacceptable as an expression
8 of personal taste. Example [Clothing
9 displaying alcohol, drugs, violence,
10 obscenity, and racism is outside our
11 responsibility and integrity guideline as a
12 school community and is prohibited].
13

14 WMHS Student/Parent Handbook 2003-2004 at 13 (brackets in
15 original).

16 Marineau gave Guiles three choices: (1) turn the shirt
17 inside-out; (2) tape over the images of the drugs and alcohol and
18 the word "cocaine"; or (3) change shirts. Marineau was unsure
19 whether the word cocaine violated the policy. He did not,
20 however, relay this doubt to the student, leaving the student to
21 think that it too must be taped over. Guiles's father came in to
22 speak with Marineau, who reiterated that the shirt contravened
23 dress code policy. Guiles and his father then went to speak with
24 Shoik who reaffirmed what Marineau had said. Guiles returned
25 home with his father for the remainder of that day.

26 On May 13, 2004 plaintiff returned to school wearing the
27 T-shirt. Marineau again instructed him to tape over the
28 offending images with duct tape, turn the shirt inside out, or
29 change shirts. Guiles declined, and Marineau filled out a
30 discipline referral form and sent plaintiff home. The discipline
31 referral form remains in Guiles's record. On May 14, 2004 Guiles

1 again wore the T-shirt to school, this time, however, with the
2 images of drugs and alcohol and the word "cocaine" covered with
3 duct tape. On the duct tape plaintiff had scrawled the word
4 "Censored."

5 DISTRICT COURT PROCEEDINGS

6 Plaintiff then brought suit in federal district court
7 seeking to enjoin defendants from enforcing the dress code policy
8 with regard to his T-shirt, and the district court conducted a
9 three-day bench trial. Defendants submitted the deposition
10 testimony of Carol L. Rose, the prevention and safety coordinator
11 for the Safe and Healthy School Team at the Vermont Department of
12 Education. Rose opined that the Williamstown High School's
13 policy of prohibiting all images of drugs and alcohol (even such
14 images used on anti-drug T-shirts and posters) was appropriate
15 because it furthers the school's environmental approach -- which
16 calls for limiting student exposure to all such images. However,
17 when asked whether "clothing that depicts anti-alcohol, drug or
18 cigarette messages is just as harmful to students as clothing
19 that advertises it," she responded that she did not know.

20 Plaintiff submitted a letter of the Vermont Department of
21 Education stating that it did not take a position with respect to
22 the merits of the case and that "[t]estimony provided by
23 deposition of Carol Rose . . . was not intended to draw any
24 conclusions with respect to the outcome of the case or any
25 substantive legal issue therein [and] [t]o the extent it did, it
26 did not reflect an official position" of the Department. Guiles

1 also presented the testimony of Charles Phillips, a former
2 principal of a neighboring school. Phillips testified that at
3 his school the approach was to ban images that advocated drug and
4 alcohol use. He also testified that he was unaware of any
5 evidence that anti-drug and anti-alcohol messages encouraged
6 students to use such substances. Because Guiles's T-shirt
7 conveyed an anti-drug message, he would not have censored it at
8 his school.

9 Finding the images plainly offensive or inappropriate under
10 Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986),
11 the district court held the school's censorship of the images was
12 proper and declined to issue an injunction. The trial court also
13 held the school violated Guiles's free speech rights by censoring
14 the word cocaine, and therefore it ordered the discipline
15 referral form expunged from Guiles's academic record. Guiles and
16 defendants both appeal.

17 DISCUSSION

18 Standard of Review

19 Normally we review the district court's findings of fact for
20 clear error and its conclusions of law de novo. See Fed. R. Civ.
21 P. 52(a); Ramos v. Town of Vernon, 353 F.3d 171, 174 (2d Cir.
22 2003). But because this appeal concerns allegations of
23 abridgement of free speech rights, we do not defer to the
24 district court's findings of fact. Instead, in First Amendment
25 cases we make an independent and searching inquiry of the entire
26 record, since we are obliged to conduct a "fresh examination of

1 crucial facts . . . so as to assure ourselves that [the lower
2 court's] judgment does not constitute a forbidden intrusion on
3 the field of free expression." Hurley v. Irish-Am. Gay, Lesbian
4 & Bisexual Group, 515 U.S. 557, 567-68 (1995); see also Bery v.
5 City of New York, 97 F.3d 689, 693 (2d Cir. 1996) ("[W]e are
6 required to make an independent examination of the record as a
7 whole without deference to the factual findings of the trial
8 court.").

9 I Free Speech Law in Schools

10 We wrestle on this appeal with the question of how far a
11 student's constitutional right freely to express himself on
12 school grounds extends. As the Supreme Court aptly put it,
13 "[o]ur problem lies in the area where students in the exercise of
14 First Amendment rights collide with the rules of the school
15 authorities." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393
16 U.S. 503, 507 (1969). We begin with several premises. First, we
17 are mindful that the "vigilant protection of constitutional
18 freedoms is nowhere more vital than in the community of [our]
19 schools." Healy v. James, 408 U.S. 169, 180 (1972). Thus
20 neither party disputes that "students have First Amendment rights
21 to political speech in public schools." Brandon v. Bd. of Educ.,
22 635 F.2d 971, 980 (2d Cir. 1980). But while students do not
23 "shed their constitutional rights to freedom of speech or
24 expression at the schoolhouse gate," Tinker, 393 U.S. at 506,
25 neither are their rights to free speech "automatically
26 coextensive with the rights of adults," Fraser, 478 U.S. at 682.

1 Indeed even for adults it is familiar law that "the right of free
2 speech is not absolute at all times and under all circumstances."
3 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting
4 that certain limited categories of speech may be prevented
5 without raising a constitutional problem: "These include the
6 lewd and obscene, the profane, the libelous, and the insulting or
7 'fighting' words -- those which by their very utterance inflict
8 injury or tend to incite an immediate breach of the peace.").

9 With these basic precepts in mind, we discuss Tinker,
10 Fraser, and Hazelwood, a trilogy of cases in which the Supreme
11 Court enunciated standards for assessing whether a school's
12 censorship of student speech is constitutionally permissible.

13 Tinker involved high school students who, to protest the
14 Vietnam war, sought to wear black armbands to school. 393 U.S.
15 at 504. In light of this proposed collective act of expression,
16 the school prohibited the wearing of black armbands and punished
17 students who ignored the ban. Id. Holding that this constituted
18 an unconstitutional abridgement of the students' free speech
19 rights, the Supreme Court ruled that with regard to "personal
20 expression that happens to occur on the school premises,"
21 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)
22 (discussing Tinker), a student may "express his opinions, even on
23 controversial subjects . . . if he does so without materially and
24 substantially interfer[ing] with the requirements of appropriate
25 discipline in the operation of the school and without colliding
26 with the rights of others," Tinker 393 U.S. at 513 (alteration in

1 original). The rule of Tinker has come to mean that a school may
2 not regulate student expression unless the regulation may be
3 "justified by a showing that the student['s] [speech] would
4 materially and substantially disrupt the work and discipline of
5 the school." Id.; see also Hazelwood, 484 U.S. 260, 280-81
6 (Brennan, J., dissenting) ("[O]fficial censorship of student
7 expression . . . is unconstitutional unless the speech materially
8 disrupts classwork or involves substantial disorder or invasion
9 of the rights of others.").

10 Nearly two decades later the Supreme Court revisited student
11 speech in Fraser. School officials in Fraser disciplined a
12 student for giving a speech peppered with sexual innuendo at a
13 school assembly. Fraser, 478 U.S. at 677-79. The Court held the
14 school's actions permissible because "it is a highly appropriate
15 function of public school education to prohibit the use of vulgar
16 and offensive terms in public discourse" among its students. Id.
17 at 683. Schools may regulate student speech insofar as it is
18 "vulgar," "lewd," "indecent," or "plainly offensive." Id. at
19 683-85; Hazelwood, 484 U.S. at 271 n.4 ("The decision in Fraser
20 rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character
21 of" the student's speech). The Court declined to apply Tinker's
22 more exacting material and substantial disturbance test because
23 the student's speech was "unrelated to any political viewpoint."
24 Fraser, 478 U.S. at 685.

25 The Supreme Court's examination of student speech continued
26 in Hazelwood, where school officials censored certain articles in

1 the school newspaper written by students regarding teen-age
2 pregnancy and a student's experience with divorce. Hazelwood,
3 484 U.S. at 263-65. The Supreme Court upheld the school's action
4 relying on the distinction between school-sponsored speech and
5 student speech that happens to occur on school grounds. See id.
6 at 270-73. In the case of the former, school officials may
7 exercise editorial control over student speech "so long as their
8 actions are reasonably related to legitimate pedagogical
9 concerns." Id. at 273; see also Peck v. Baldwinsville Cent. Sch.
10 Dist., 426 F.3d 617, 627-29 (2d Cir. 2005) (discussing difference
11 between Tinker -- speech that happens to occur on school property
12 -- and Hazelwood -- school sponsored speech).

13 We distill the following from Tinker, Fraser, and Hazelwood:

- 14 (1) schools have wide discretion to prohibit speech
15 that is less than obscene -- to wit, vulgar, lewd,
16 indecent or plainly offensive speech, Fraser, 478
17 U.S. at 683-85; Hazelwood, 484 U.S. at 272 n.4;
- 18 (2) if the speech at issue is "school-sponsored,"
19 educators may censor student speech so long as the
20 censorship is "reasonably related to legitimate
21 pedagogical concerns," Hazelwood, 484 U.S. at 273;
22 and
23
- 24 (3) for all other speech, meaning speech that is
25 neither vulgar, lewd, indecent or plainly
26 offensive under Fraser, nor school-sponsored under
27 Hazelwood, the rule of Tinker applies. Schools
28 may not regulate such student speech unless it
29 would materially and substantially disrupt
30 classwork and discipline in the school. See
31 Tinker, 393 U.S. at 513.
32
33

34 Our articulation of the Tinker - Fraser - Hazelwood trilogy is in
35 accord with how other circuits commonly understand these cases.
36 See, e.g., Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214

1 (3d Cir. 2001) (Alito, J.) ("To summarize: Under Fraser, a
2 school may categorically prohibit lewd, vulgar or profane
3 language. Under Hazelwood, a school may regulate school-
4 sponsored speech Speech falling outside of these
5 categories is subject to Tinker's general rule");
6 Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir.
7 1992) ("We conclude . . . that the standard for reviewing the
8 suppression of vulgar, lewd, obscene, and plainly offensive
9 speech is governed by Fraser, school-sponsored speech by
10 Hazelwood, and all other speech by Tinker.").

11 We pause here to acknowledge some lack of clarity in the
12 Supreme Court's student-speech cases. Tinker involved political
13 viewpoint-based discrimination and established a "material and
14 substantial interference" test that permits schools to restrict
15 student speech only where, as noted, "necessary to avoid material
16 and substantial interference with schoolwork or discipline." 393
17 U.S. at 511. It is not entirely clear whether Tinker's rule
18 applies to all student speech that is not sponsored by schools,
19 subject to the rule of Fraser, or whether it applies only to
20 political speech or to political viewpoint-based discrimination.
21 Nor is Tinker entirely clear as to what constitutes "substantial
22 disorder" or "substantial disruption" of or "material
23 interference" with school activities. Id. at 513-14. The
24 opinion alludes to "threats [and] acts of violence on school
25 premises," id. at 508, but does not otherwise explain what might

1 qualify as "materially and substantially disrupt[ing] the work
2 and discipline of the school." Id. at 513.

3 Language in the Supreme Court's subsequent ruling in
4 Hazelwood sheds some light on these questions by suggesting that
5 the Court considers the rule of Tinker to be generally applicable
6 to student-speech cases. Hazelwood, 484 U.S. at 270-73
7 (distinguishing between the Tinker standard "for determining when
8 a school may punish student expression" and "the standard for
9 determining when a school may refuse to lend its name and
10 resources to the dissemination of student expression"). But see
11 Fraser, 478 U.S. at 680 (noting "[t]he marked distinction between
12 the political 'message' of the armbands in Tinker and the sexual
13 content of [the] speech in this case" and that the Court had
14 upheld "the students' right to engage in a nondisruptive, passive
15 expression of a political viewpoint in Tinker" (emphasis added));
16 id. at 685 (noting that the penalties imposed for the sexually
17 explicit speech were "unrelated to any political viewpoint" and
18 thus did not implicate the rule of Tinker); Bd. of Educ., Island
19 Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866
20 (1982) (plurality opinion) (stating that Tinker "held that
21 students' rights to freedom of expression of their political
22 views could not be abridged by reliance upon an 'undifferentiated
23 fear or apprehension of disturbance' arising from such
24 expression" (emphasis added)). Proceeding according to the
25 understanding that Tinker applies to all non-school-sponsored
26 student speech that is not lewd or otherwise vulgar, we note that

1 if the "material and substantial interference" test is meant to
2 describe vocal protests and disputes of similar character and
3 magnitude, schools must tolerate a great deal of student speech
4 that is not lewd or vulgar. Put differently, Tinker established
5 a protective standard for student speech under which it cannot be
6 suppressed based on its content, but only because it is
7 substantially disruptive.

8 II Applying the Supreme Court Standards

9 We turn next to which standard applies to this appeal. That
10 the parties vigorously contest this point is not surprising.
11 Where this case falls on the Tinker - Fraser - Hazelwood spectrum
12 primarily determines whether the defendants' censorship of
13 Guiles's T-shirt survives First Amendment scrutiny. For the
14 reasons set out below, we hold that neither Hazelwood nor Fraser
15 govern, and therefore, the general rule of Tinker applies.

16 A. Hazelwood Does Not Apply

17 We agree with the district court that Hazelwood is
18 inapplicable. The deferential standard of Hazelwood, which
19 permits schools to regulate student speech so long as the
20 regulation reasonably relates to "legitimate pedagogical
21 concerns," Hazelwood, 484 U.S. at 273, comes into play only when
22 the student speech is "school-sponsored" or when a reasonable
23 observer would believe it to be so sponsored, see id. at 273-74;
24 Peck, 426 F.3d at 628-29; Saxe, 240 F.3d at 213-14 (noting that
25 "Hazelwood's permissive 'legitimate pedagogical concern' test
26 governs only when a student's school-sponsored speech could

1 reasonably be viewed as speech of the school itself" (emphasis
2 added)). No one disputes that the school did not sponsor
3 Guiles's T-shirt or that the T-shirt could not reasonably be
4 viewed as bearing the school's imprimatur. While we do not doubt
5 that an anti-drug and alcohol policy may be of "legitimate
6 pedagogical concern" to schools, absent school sponsorship,
7 defendants may not look to Hazelwood for support.

8 B. Fraser Does Not Apply

9 We disagree with the district judge that Fraser governs this
10 case. The district court applied Fraser, reasoning that it must
11 ask whether "the images of drugs and alcohol are offensive or
12 inappropriate," and concluding that, if so, "then, under Fraser,
13 they may be censored." Guiles, 349 F. Supp. 2d at 881 (emphasis
14 added). The trial court then accepted the "judgment of the
15 defendants that such images are an inappropriate form of
16 expression for their middle school" and accordingly, upheld the
17 school's censorship of Guiles's T-shirt. Id. We believe the
18 district court misjudged the scope of Fraser and, consequently,
19 applied it in error.

20 Fraser's reach is not as great as the trial court presumed.
21 Fraser permits schools to censor student speech that is "lewd,"
22 "vulgar," "indecent," or "plainly offensive." Fraser, 478 U.S.
23 at 683-85; Hazelwood, 484 U.S. at 271 n.4 (discussing Fraser).
24 We thus ask whether the images of a martini glass, a bottle and
25 glass, a man drinking from a bottle, and lines of cocaine
26 constitute lewd, vulgar, indecent, or plainly offensive speech.

1 We think it clear that these depictions on their own are not
2 lewd, vulgar, or indecent. Lewdness, vulgarity, and indecency
3 normally connote sexual innuendo or profanity. See Merriam-
4 Webster's Third New Int'l Dictionary 1147, 1301, 2566 (1st ed.
5 1981) (defining (a) "lewd" as "inciting to sensual desire or
6 imagination," (b) "vulgar" as "lewd, obscene, or profane in
7 expression," and (c) "indecent" as "being or tending to be
8 obscene").

9 We are left then with the question of whether the pictures
10 are plainly offensive. Indeed, the district court held Fraser
11 applicable on the basis of its "plainly offensive" language,
12 which it interpreted broadly. Guiles, 349 F. Supp. 2d at 881.
13 What then constitutes plainly offensive speech under Fraser?
14 And, can we say that depictions of drugs and alcohol such as
15 those on Guiles's T-shirt are plainly offensive? These are
16 questions of first impression in this Circuit. While what is
17 plainly offensive is not susceptible to precise definition, we
18 hold that the images depicted on Guiles's T-shirt are not plainly
19 offensive as a matter of law.

20 Dictionaries commonly define the word offensive as that
21 which causes displeasure or resentment or is repugnant to
22 accepted decency. See Merriam-Webster's Third Int'l Dictionary
23 1156; Black's Law Dictionary 1110 (7th ed. 1999). We doubt the
24 Fraser Court's use of the term sweeps as broadly as this
25 dictionary definition, and nothing in Fraser suggests that it
26 does. But if it does, then the rule of Tinker would have no real

1 effect because it could have been said that the school
2 administrators in Tinker found wearing anti-war armbands
3 offensive and repugnant to their sense of patriotism and decency.
4 Yet the Supreme Court held the school could not censor the
5 students' speech in that case.

6 What is plainly offensive for purposes of Fraser must
7 therefore be somewhat narrower than the dictionary definition.
8 Courts that address Fraser appear to treat "plainly offensive"
9 synonymously with and as part and parcel of speech that is lewd,
10 vulgar, and indecent -- meaning speech that is something less
11 than obscene but related to that concept, that is to say, speech
12 containing sexual innuendo and profanity. See Frederick v.
13 Morse, 439 F.3d 1114, 1118-19 (9th Cir. 2006) (discussing
14 Fraser's focus on sexually charged nature of student speech); see
15 also Saxe, 240 F.3d at 213 (noting that "Fraser permits a school
16 to prohibit words that 'offend for the same reasons that
17 obscenity offends"). In fact, the Supreme Court deemed Fraser's
18 speech could be freely censored because it was imbued with sexual
19 references, bordering on the obscene. See Fraser, 478 U.S. at
20 683 ("The pervasive sexual innuendo in Fraser's speech was
21 plainly offensive to both teachers and students." (emphasis
22 added)).

23 What is more, the cases cited by Fraser all concern
24 vulgarity, obscenity, and profanity. See Fraser, 478 U.S. at
25 684-85, where the Supreme Court cites Ginsberg v. New York, 390
26 U.S. 629, 639-41 (1968) (upholding ban on sale of sexually

1 oriented material to minors); Pico, 457 U.S. at 871-72
2 (acknowledging that school may remove "pervasively vulgar" books
3 from library); and FCC v. Pacifica Found., 438 U.S. 726, 745-48
4 (1978) (upholding FCC's ability to censor "obscene, indecent, or
5 profane" speech). It is further instructive on this point that
6 the Ninth Circuit's recent opinion in Frederick refused to uphold
7 a school's disciplinary action against a student who displayed a
8 clearly pro-drug banner, which read "Bong Hits 4 Jesus."
9 Frederick, 439 F.3d at 1123. In distinguishing Fraser and
10 holding it did not apply, the Ninth Circuit stated: "The phrase
11 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending
12 on one's point of view, but it is not 'plainly offensive' in the
13 way sexual innuendo is." Id. at 1119.

14 Judge Newman's oft-quoted concurrence in a case that pre-
15 dates Fraser also suggests that the district court's reading of
16 Fraser is incorrect. Judge Newman noted that "[t]he First
17 Amendment does not prevent a school's reasonable efforts toward
18 the maintenance of campus standards of civility and decency" and
19 memorably stated that "the First Amendment gives a high school
20 student the classroom right to wear Tinker's armband, but not
21 Cohen's jacket." Thomas v. Bd. of Educ., Granville Cent. Sch.
22 Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J.,
23 concurring) (referring to Cohen v. California, 403 U.S. 15
24 (1971), in which the Supreme Court upheld an adult's right to
25 wear a jacket bearing the statement "[F. . . expletive deleted]
26 the Draft"). The import of his analysis was that "a school can

1 act to keep indecent language from circulating on high school
2 grounds." Id. Fraser itself quoted Judge Newman and indicated
3 that its rule applies to the "manner of speech," i.e., the
4 offensiveness of its form, but not the speech's content. 478
5 U.S. at 682-83, 685; see also Hazelwood, 484 U.S. at 286 n.2
6 (Brennan, J., dissenting) (stating that Fraser is limited to "the
7 appropriateness of the manner in which the message is conveyed,
8 not of the message's content") (emphasis in original); Newsom ex
9 rel. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 256 (4th
10 Cir. 2003) ("When speech in school falls within the lewd, vulgar,
11 and plainly offensive rubric, it can be said that Fraser limits
12 the form and manner of speech, but does not address the content
13 of the message."); Boroff v. Van Wert City Bd. of Educ., 220 F.3d
14 465, 473 (6th Cir. 2000) (Gilman, J., dissenting) (noting that
15 the terms "vulgar" and "offensive" in Fraser "refer to words and
16 phrases that are themselves coarse and crude, regardless of
17 whether one disagrees with the overall message that the speaker
18 is trying to convey").

19 Moreover, the Fraser Court, in noting the "interest in
20 protecting minors from exposure to vulgar and offensive spoken
21 language," discussed at some length its earlier opinion in
22 Pacifica, 438 U.S. 726. Fraser, 478 U.S. at 684-85. Pacifica
23 involved comedian George Carlin's "Filthy Words" monologue, which
24 the Fraser Court characterized as "vulgarity." Id. at 685. It
25 noted that the words comprising the monologue, which dealt with
26 sexuality and excretion, "offend for the same reasons that

1 obscenity offends." Id.; Saxe, 240 F.3d at 213 (noting that
2 "Fraser permits a school to prohibit words that 'offend for the
3 same reasons that obscenity offends'). For these reasons and
4 others we discuss below, although we need not conclusively
5 determine what is "plainly offensive" under Fraser to resolve the
6 instant case, we decline to adopt the position of the Sixth
7 Circuit in Boroff that a school has broad authority under Fraser
8 to prohibit speech that is "inconsistent with its basic
9 educational mission." 220 F.3d at 470; Frederick, 439 F.3d at
10 1122 (declining to follow Boroff's implication that schools have
11 "wide-ranging discretion to determine the appropriateness or
12 inappropriateness of certain messages at school" under Fraser).

13 Here, the images of a martini glass, alcohol, and lines of
14 cocaine, like the banner in Frederick, may cause school
15 administrators displeasure and could be construed as insulting or
16 in poor taste. We cannot say, however, that these images, by
17 themselves, are as plainly offensive as the sexually charged
18 speech considered in Fraser nor are they as offensive as
19 profanity used to make a political point. See Thomas, 607 F.2d
20 at 1057 (Newman, J., concurring in result). We do not think in
21 light of this discussion that the images on plaintiff's T-shirt
22 are plainly offensive, especially when considering that they are
23 part of an anti-drug political message.

24 III Defendants' Argument Rejected

25 Defendants principally declare that all images of illegal
26 drugs and alcohol -- even images expressing an anti-drug view,

1 such as those on Guiles's T-shirt -- are plainly offensive
2 because they undermine the school's anti-drug message. We do not
3 find this argument persuasive.

4 To begin, sister circuits have rejected similar arguments.
5 In Newsom, 354 F.3d 249, the Fourth Circuit addressed a school
6 dress code that prohibited all images of weapons on clothing.
7 Id. at 254. The student in Newsom was told not to wear a
8 National Rifle Association T-shirt that depicted "'men shooting
9 guns.'" Id. at 253. As in the case before us, the school in
10 Newsom relied on the argument that the image conflicted with the
11 school's "message" that "Guns and Schools Don't Mix." Id. at
12 252-53. In striking the dress code as overly broad, Newsom
13 applied Tinker instead of Fraser and held essentially that while
14 pictures of weapons that promote violence may arguably be
15 regulated, id. at 257, it cannot be said that all such depictions
16 are per se offensive, see id. at 259-60 (ruling that ban on all
17 images of weapons overly broad); accord Frederick, 439 F.3d at
18 1121. Similarly, in Castorina ex rel. Rewt v. Madison County
19 School Board, 246 F.3d 536 (6th Cir. 2001), the Sixth Circuit was
20 confronted with a school's order that reprimanded a student for
21 wearing clothing bearing confederate flags. Id. at 538.
22 Confederate flags have been associated with racist ideology, and
23 could undermine the school's mission to promote tolerance. But
24 the Sixth Circuit applied Tinker rather than Fraser and remanded
25 the case for further fact-finding regarding disruption. Id. at
26 543-44.

1 The flaw in defendants' position is that it conflates the
2 rule of Hazelwood with Fraser, and in doing so, eviscerates
3 Tinker. Defendants censored the images because they believed
4 such images were contrary to the school's basic educational aim
5 of having an anti-drug school environment. We observe in passing
6 that the witness offered by defendants to opine on their
7 environmental methodology did not point to any specific evidence
8 showing that anti-drug and alcohol images are harmful or lead to
9 the use (or increased abuse) of such substances by high school
10 students.

11 Moreover, the phrase "plainly offensive" as used in Fraser
12 cannot be so broad as to be triggered whenever a school decides a
13 student's expression conflicts with its "educational mission" or
14 claims a legitimate pedagogical concern. Were that the rule then
15 Fraser would effectively swallow Hazelwood's holding that school
16 officials may censor student speech if (1) the censorship
17 reasonably relates to a legitimate pedagogical concern, and (2)
18 the speech is school-sponsored. Hazelwood, 484 U.S. at 273-74.
19 Indeed, if schools were allowed to censor on such a wide-ranging
20 basis, then Tinker would no longer have any effect. As the Ninth
21 Circuit aptly stated

22 All sorts of missions are undermined by
23 legitimate and protected speech -- a school's
24 anti-gun mission would be undermined by a
25 student passing around copies of John R.
26 Lott's book, More Guns, Less Crime; a
27 school's anti-alcohol mission would be
28 undermined by a student e-mailing links to a
29 medical study showing less heart disease

1 Guiles to cover the drug and alcohol illustrations. Because
2 Guiles's T-shirt did not cause any disruption, defendants'
3 censorship was unwarranted.

4 We find no merit in defendants' "no harm, no foul
5 contention," namely, that though they directed the images
6 covered, the text and other images remained, and hence, the
7 political message of the T-shirt was left intact. The pictures
8 are an important part of the political message Guiles wished to
9 convey, accentuating the anti-drug (and anti-Bush) message. By
10 covering them defendants diluted Guiles's message, blunting its
11 force and impact. Such censorship may be justified under Tinker
12 only when the substantial disruption test is satisfied.

13 We add that our holding on this appeal is limited. Guiles
14 brings only an as-applied challenge to the dress code. He seeks
15 declaratory relief enjoining defendants from enforcing the dress
16 code as it applies to his particular T-shirt. We thus make no
17 holding with respect to whether images of illegal drugs and
18 alcohol on a T-shirt that promotes drug and alcohol use could be
19 censored under the Supreme Court's student-speech cases. While
20 the Court has indicated, in dicta, that "[a] school must . . .
21 retain the authority to refuse to sponsor speech that might
22 reasonably be perceived to advocate drug or alcohol use,"
23 Hazelwood, 484 U.S. at 272 (emphasis added), it has never
24 addressed this issue. At least one of our sister circuits,
25 however, has held that a school could not punish students for
26 waiving a pro-drug banner near campus at a school-authorized

1 event without reaching the question of whether the school could
2 prohibit a student from wearing a pro-drug T-shirt on campus.
3 Frederick, 439 F.3d at 1123 & n.45. We address only the images
4 on Guiles's T-shirt and do not prejudge any question to be
5 presented in a subsequent case.

6 Finally, defendants have cross-appealed that part of the
7 district court's holding that the school should expunge Guiles's
8 disciplinary record. Because we find that Guiles was entitled to
9 the injunction permitting him to wear his T-shirt, we must affirm
10 the ruling that Guiles's suspension should be expunged from his
11 school record.

12 CONCLUSION

13 Accordingly, for the foregoing reasons, we vacate the
14 district court's order insofar as it denied Guiles's declaratory
15 judgment action seeking to enjoin defendants from enforcing the
16 dress code with regard to his T-shirt. We affirm the district
17 court's holding that the disciplinary action should be expunged
18 from Guiles's record and remand this matter to the district court
19 for further proceedings consistent with this opinion.